

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1493

be argued by
T. BARRY KINGHAM

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1493

UNITED STATES OF AMERICA,

Appellee,

—v.—

PHILIP LANDWEHR,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

T. BARRY KINGHAM,
RICHARD WEINBERG,
*Assistant United States Attorneys,
Of Counsel.*

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**United States Court of Appeals
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Docket No. 77-1493

UNITED STATES OF AMERICA,

Appellee,

—v.—

PHILIP LANDWEHR,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Philip Landwehr appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on November 21, 1977, by the Honorable Robert J. Ward, United States District Judge, following the defendant's plea of guilty.

Indictment 77 Cr. 196, filed on March 17, 1977, charged the defendant Landwehr in thirty-three counts with conspiracy, bankruptcy fraud, perjury and obstruction of ICC proceedings, in violation of Title 18, United States Code, Sections 371, 152, 1623 and 1505, respectively.

On August 16, 1977, Landwehr pleaded guilty to Count 30, which alleged the filing of a false statement in the United States Bankruptcy Court, in violation of Title 18, United States Code, Section 152. On November

21, 1977 the District Court imposed a sentence of three years imprisonment. The remaining thirty-two counts and an indictment in the District of New Jersey were then dismissed with the Government's consent.

Landwehr is presently serving his sentence. A motion for bail pending this appeal was denied by Judge Ward on December 21, 1977. Landwehr did not appeal the denial of the motion.

Statement of Facts

A. The Indictments

The New York indictment charged that Landwehr and his co-defendant Michael Daspin, using the services of co-defendants Gerald Griffin and Lu Wood and others, acquired control of four upstate New York trucking companies, placed them in reorganization under Chapter XI of the Bankruptcy Act and kept them alive through filing false operating statements with the Bankruptcy Court in the Southern District of New York. The indictment charged that the Chapter XI petitions contained false information about the companies' financial status and the identity of their creditors. It was alleged that the defendants' scheme continued from October 24, 1973, the date of the filing of the first Chapter XI petitions, through May 7, 1975, the date of the filing of the last false statement of operating profit. The purpose of the scheme, as made clear through the presentence report (11/21/77, Tr. 40-41)* was to permit Landwehr and Daspin to reap considerable personal gain by taking salaries from all of the companies while failing to pay

* "Tr." refers to transcripts of proceedings before the District Court; "Def. App." refers to the defendant's appendix; "Br." refers to the defendant's brief.

any creditors or taxes. In addition to the conspiracy and bankruptcy fraud charges, Landwehr was charged with perjury before the Bankruptcy Court by denying any connection between one of the bankrupt companies and the other three (Count 32) and with obstruction of justice by directing witnesses not to appear at the Interstate Commerce Commission hearings concerning the operation of the companies (Count 33).

In the District of New Jersey, Landwehr was charged with conspiracy and bankruptcy fraud in connection with the concealment of the assets of Translease Systems, Inc., a bankrupt truck-leasing company. Landwehr was also charged with six counts of obstruction of justice, arising from his alleged agreement with his co-defendants to have witnesses testify falsely and to have false documents filed in the Bankruptcy Court for the District of New Jersey.

Trial on the New York indictment was set for August 16, 1977, with trial on the New Jersey indictment to follow in September. Both indictments were originally filed in March 1977.*

B. The Plea Agreement

Prior to his plea of guilty, Landwehr entered into a written agreement with the United States Attorneys' Offices for the Southern District of New York and the District of New Jersey. The Government agreed to accept Landwehr's plea of guilty to Count 30 of Indictment 77 Cr. 196 in satisfaction of the thirty-three counts in that indictment and also the fifteen counts of conspir-

* A motion to dismiss the New Jersey indictment was granted by Judge Stern on the grounds of duplicitous pleading in May 1977. A new indictment, alleging the same basic facts, was filed a month later.

acy, bankruptcy fraud and obstruction of justice pending against Landwehr in the District of New Jersey. Landwehr agreed to:

"... cooperate forthwith with agents and attorneys for the United States of America in the Southern District of New York and District of New Jersey by providing complete, candid and truthful information." (Def. App. 19).

Conditioned upon Landwehr's performance of the agreement, the Government agreed to advise the District Court "of the full nature, extent and value of the cooperation" furnished by Landwehr. (Def. App. 18). Landwehr and his attorneys signed the agreement and Landwehr acknowledged that it was "the full and complete understanding and agreement" with respect to his plea of guilty. (8/16/77, Tr. 10).

C. The Sentencing

Landwehr was sentenced by Judge Ward on November 21, 1977.* At that time the District Court received the testimony of a psychiatrist with respect to the effect of Landwehr's situation on his hemophiliac son (11/21/77, Tr. 5-17), and heard lengthy statements from both of Landwehr's attorneys. (11/21/77, Tr. 18-33). In addition, Judge Ward received a letter from an Assistant United States Attorney for the District of New Jersey which stated, in pertinent part:

"... Mr. Landwehr has been afforded the opportunity to meet with me and other members of the staff of the United States Attorney's Office for the District of New Jersey on several occasions. Based upon these meetings it is the Government's posi-

* The sentence was set for November 3, 1977 and adjourned by consent to November 21. (8/16/77, Tr. 21).

tion that Mr. Landwehr has been extremely uncooperative." (Def. App. 94-95).*

Landwehr's counsel responded to the letter, claiming that Landwehr had been cooperative, and that although Landwehr had not been candid in his initial five or six meetings with the Government attorneys in New Jersey, he then began to cooperate "more freely." Counsel stated that Landwehr had made ten trips to the United States Attorney's Office and that he "gave lots of information." Counsel also made the preposterous suggestion that whether or not the Government believed Landwehr had been truthful he should have been called to testify before a grand jury. Counsel claimed that another reason for Landwehr's lack of cooperation was fear, because a witness in the investigation had been killed and because the Government had suggested that Landwehr enter the Witness Protection Program. Counsel asked that the Court conduct a "sentencing inquiry" if Judge Ward was going to "sentence importantly on the basis of this man's cooperation or lack of it." (11/21/77, Tr. 28-33). Finally, Landwehr's attorney recognized the Court's right to discount the issue of cooperation altogether. (11/21/77, Tr. 33). Government counsel did not dispute the defendant's factual statements, but replied that Landwehr was deemed uncooperative due to his failure to give information which was satisfactory in the light of the other evidence available to the U.S. Attorney. (11/21/77, Tr. 39-40).

* Landwehr suggests that the letter was changed from "cooperative" to "uncooperative" just prior to sentencing. (Br. at X). There is no evidence to support this allegation, save the fortuitous circumstance that the typist split the word, placing "un" on the line above "cooperative." In any event, as Judge Ward noted, the letter as it reached the Court and counsel three days prior to sentencing read "uncooperative." (11/21/77, Tr. 89). This letter was prepared by the United States Attorney for the District of New Jersey because the information which the government believed Landwehr had to offer related to investigations in that district. (Def. App. 93).

In sentencing Landwehr, Judge Ward reviewed the seriousness of the crime, which involved a substantial fraud upon the Bankruptcy Court for personal gain. He also took into consideration a disingenuous letter to the Court in which the defendant attempted to minimize his involvement in the crime when in fact he was a principal who benefitted considerably from his wrongdoing. Judge Ward disregarded a prior misdemeanor conviction and properly recognized that for a man of Landwehr's background and education the offense was one of venality, not stupidity. (11/21/77, Tr. 40-42).

With respect to Landwehr's lack of cooperation, the Court stated:

"I take that letter and I put it aside. I view cooperation as either a positive plus or a zero. The matter is something which while it may have helped Mr. Landwehr in connection with the sentence I am about to impose, will not be used by this Court to penalize him. It is a zero. It is not a minus and it is not a penalty. I have to take the statement of the United States Attorney, whether in his view or judgment, with all the background that he has, there has been a positive assistance rendered by Mr. Landwehr. He has said no. Whether the word cooperate appeared previously, the letter as it was presented to me says, 'extremely uncooperative.' I put that letter aside and as I say will not consider it as a penalty."

Accordingly, Landwehr was sentenced based upon his participation in the crime with which he was charged, without regard to his lack of cooperation.

A R G U M E N T

POINT I

The District Court Was Not Required to Conduct an Evidentiary Hearing.

Couched in several points, Landwehr's claim on appeal essentially is that he was entitled to an evidentiary hearing to determine the validity of the Government's assertion that he had been "extremely uncooperative." This argument is without merit. Landwehr was given the opportunity to present to the District Court any evidence and other matters in mitigation of punishment, and he did so. Specifically, he had ample opportunity to demonstrate to Judge Ward that he had cooperated and that the Government's claim to the contrary was erroneous. Consequently, Judge Ward was not required to conduct a formal evidentiary hearing to determine if Landwehr had cooperated. The District Court, in its discretion, properly decided the issue without such a hearing and declined to consider Landwehr's lack of cooperation as a negative factor.

Neither due process nor any rule *requires* an evidentiary hearing in these circumstances. *United States v. Malcolm*, 432 F.2d 809, 817 (2d Cir. 1970). Rather, as this Court has made clear, the procedure to be followed in enabling a defendant to present his version of the facts at sentencing is within the sound discretion of the sentencing judge. *United States v. Kaplan*, Dkt. No. 77-1428, slip op. 1465, 1467 (2d Cir. February 3, 1978); *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976); *United States v. Needles*, 472 F.2d 652, 658 (2d Cir. 1973). While Landwehr now argues that an evidentiary hearing should have been held to evaluate the Government's allegation of his lack of cooperation, no such hearing is required where the defendant otherwise has had a full opportunity to

rebut the allegations. *United States v. Robin, supra*, 545 F.2d at 779, and cases cited therein; *United States v. Rosner*, 485 F.2d 1213, 1230-31 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974). Indeed, this Court has held that "normally, verbal explanation or comment is sufficient." *Id.*, 485 F.2d at 1230.

Landwehr was given every possible chance to present his version of the facts, and nothing in this record suggests that Judge Ward abused his discretion in failing to conduct an evidentiary hearing. The defendant and both of his lawyers addressed the Court, and one lawyer spoke specifically on the cooperation issue. (11/21/77, Tr. 28-33). In addition, evidence in the form of a psychiatrist's testimony was presented. Thus the District Court complied fully with Rule 32(a)(1), Fed. R. Crim. P. Landwehr places incorrect reliance upon Rule 32(c)(3)(A), which arguably permits sentencing hearings in certain limited circumstances. First, the rule on its face applies only to disputed matters in presentence investigations; that is not an issue here. Second, even if the rule were to apply, it requires that the Court give "the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report." Here the Court afforded Landwehr more than sufficient opportunity to do that.

Landwehr's thorough counsel recounted the defendant's purported "cooperation" in detail. There was no factual dispute concerning the number of visits and amount of information furnished by Landwehr. Rather, as Government counsel stated, the Government simply was not satisfied with the content of Landwehr's answers during

his visits to the United States Attorney in New Jersey.* Any further inquiry would have required the District Court to assess all of the evidence developed through the federal grand jury in New Jersey and to weigh Landwehr's credibility in light of that evidence. That would have created a mini-trial, as well as an unwarranted disclosure to Landwehr and his counsel of all the evidence in an investigation which had not yet proceeded to indictment.** Thus, Judge Ward properly exercised his discretion in disregarding the cooperation issue after considering Landwehr's representations and the good-faith conclusion of the United States Attorney that Landwehr had been extremely uncooperative. *United States v. Eucker*, 532 F.2d 249, 256 (2d Cir. 1976).

* Landwehr connotes some sinister motive to the fact that Arthur S. Goldstein, the Assistant United States Attorney who authored the letter "failed to appear" at sentencing. (Br. at 16). In fact, as Government counsel informed the Court, Mr. Goldstein was delayed in arriving from a court appearance in Camden, and could not attend the sentencing as previously planned. The U.S. Attorney in New Jersey was represented by Kenneth N. Laptook, another Assistant familiar with the case.

** Moreover, a hearing at this point might have resulted to Landwehr's detriment since the District Court could have ruled that he had not cooperated and then considered that lack of cooperation against him. Unlike *United States v. Ramos*, Dkt. No. 77-1271, slip op. 1575 (2d Cir. February 15, 1978), the defendant here agreed to cooperate and breached the agreement. This Court in *Ramos*, addressing the situation where the defendant had pleaded guilty without such an agreement, held that his lack of cooperation could not be considered against him. Here, Landwehr's breach of his plea agreement could be considered against him since he specifically agreed to have his cooperation considered by the Court. Moreover, as Landwehr's counsel conceded (12/21/77, Tr. 6), even in the event of a remand from this appeal, the sentencing court could increase the sentence if revelation of the details of Landwehr's lack of cooperation constituted a change in the circumstances known to the District Court at the time of sentencing. *United States v. Albanese*, 554 F.2d 543, 547 (2d Cir. 1977). See *United States v. Coke*, 404 F.2d 836 (2d Cir. 1968) (en banc).

This is not the troublesome case where a defendant is denied the opportunity to contest allegations made by the Government at the time of sentencing. Landwehr had sufficient opportunity to confront the source of the information he claims was adverse to him. Unlike *United States v. Fatico*, 22 Cr. L. Rep. 2286 (E.D.N.Y., December 21, 1977), in which the Government sought to rely at sentencing upon adverse informant-supplied information, Landwehr knew very well the source of the letter which Judge Ward disregarded. Yet Landwehr presented no evidence in addition to his counsel's extensive argument that he had been cooperative. This simply is not a case, like *Fatico*, in which the defendant could be prejudiced by the Court's reliance on information supplied by an unknown source. In any event, the result in *Fatico* was exclusion of the adverse matter, which is exactly what Judge Ward did in this case by disregarding the Government's letter.

It is also important to note that Landwehr's request for a hearing below was conditioned on Judge Ward's sentencing "importantly on the basis of this man's cooperation or lack of it" and that his counsel acknowledged the Court's right to disregard the issue of cooperation. (11/21/77, Tr. 33). By doing so Judge Ward complied with the defendant's obvious suggestion that no hearing be held unless lack of cooperation was "important" to the Court. Landwehr cannot now complain of the result he invited below simply because the three year sentence was more than he had expected.

As Judge Ward pointed out in denying bail pending this appeal,* Landwehr seeks now to have the Court be-

* At a bail hearing held at defense counsel's request a month after the imposition of sentence Judge Ward stated what was obvious from a reading of the sentencing minutes—that

[Footnote continued on following page]

lieve that he did not have the opportunity to present the information concerning his cooperation, while at the same time exclaiming that he did present these matters to the trial court. (12/21/77, Tr. 14-15). Of course, that is exactly the situation here. Landwehr had the chance to argue his case for cooperation before Judge Ward and he did so. To substantiate his claim further, Landwehr could have provided the Court with additional specifics of the "cooperation" he claimed to have given. Yet, despite having had sufficient time to prepare for sentencing and to present such matters, Landwehr chose not to. Compare, *United States v. Robin*, *supra*. Now, obviously dissatisfied with the length of his sentence, he seeks resentencing relief to which he clearly is not entitled.*

In advancing the claim that Judge Ward was required to hold an evidentiary hearing Landwehr is asking this Court to depart substantially from applicable precedent and to establish a new rule to govern sentences—when-ever a defendant takes issue with a Government claim the sentencing judge must conduct a full evidentiary hearing and must resolve the factual issues. As we have demonstrated, this Court requires sentencing judges to insure that the defendant is given sufficient opportunity to present his version of relevant events; the procedures to be followed are in the sentencing court's discretion. There is simply no reason to require sentencing judges to follow one inflexible procedure—an evidentiary hearing—when-

Landwehr was asked at the time of sentencing if he wanted to say anything in mitigation of sentence, and that he was in a perfect position at that time to present to the Court the facts underlying his cooperation. (12/21/77, Tr. 8-9, 13).

* In any event, this is not a case which should be remanded to a different District Judge, as Landwehr suggests. (Br. at 33). Judge Ward exhibited no bias against the defendant, nor are any of the factors discussed in *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) present.

ever the defendant and the Government disagree on an issue at the time of sentencing. See *United States v. Kaplan, supra*, slip op. at 1467; *United States v. Robin, supra*, 545 F.2d at 658; *United States v. Needles, supra*, 472 F.2d at 658. Such a rule would be particularly inappropriate in the situation presented by this appeal where an experienced and careful District Judge stated unequivocally that he would not consider the disputed factor against the defendant in imposing sentence.

Probably in recognition of the fact that he was given the opportunity to present his version of the facts underlying his cooperation to the sentencing judge and that the law does not compel the sentencing judge to conduct an evidentiary hearing whenever an issue is disputed at sentencing, Landwehr attempts to create the erroneous impression that his three year sentence was unduly harsh and that the District Court enhanced his punishment because of his failure to cooperate (Br. at 3, 13). This intimation is simply incorrect. Judge Ward unambiguously stated that while a positive report of cooperation might have helped Landwehr, his failure to cooperate would not be used against him.* (11/21/77, Tr. 40-42).

Moreover, Landwehr's sentence is explained readily by factors having nothing to do with his failure to cooperate, and in light of those factors his sentence was

* In fact, Judge Ward followed precisely the views expressed recently by this Court in *United States v. Ramos, supra*, Slip Op. at 1582, n.2. While he might have extended leniency to Landwehr had he cooperated, Judge Ward recognized the possible impropriety in assessing "additional punishment to a defendant who by his silence has committed no offense." *Id.* This simply is not a case like *United States v. Rogers*, 504 F.2d 1079 (5th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975), upon which Landwehr places undue reliance. (Br. at 3) There the District Court considered lack of cooperation as a negative sentencing factor. Here Judge Ward specifically did *not* consider it. The constitutional concerns expressed in *Ramos* and *Rogers* are therefore not present in this case.

not "unduly harsh." Compare, *United States v. Ramos, supra*; *United States v. Robin, supra*. Here Landwehr, the moving force in an extensive interstate bankruptcy fraud scheme, was sentenced to three years of a possible maximum exceeding a hundred years. He was specifically permitted to plead guilty to only one count with an exposure of five years because the Government believed that, in the event Landwehr cooperated, such exposure would be sufficient to cover all the crimes Landwehr had committed. Landwehr fully understood that the District Court had discretion to impose the maximum sentence (8/16/77, Tr. 9), and he received far less than the maximum. The sentence was particularly appropriate in light of Landwehr's culpability, his background and his personal circumstances, including many of the factors which Judge Ward considered at defense counsel's urging. See pp. 4-5, *supra*.

Despite Landwehr's claim to the contrary it is not significant that other defendants received lesser sentences. Gerald Griffin and Lu Wood, sentenced by Judge Ward to probation of five and two years respectively, were Landwehr's subordinates in the scheme. They furnished full cooperation throughout the Government's investigation and, as Judge Ward found, were in no measure as culpable as Landwehr. (11/21/77, Tr. 38). Michael Daspin, the co-defendant at Landwehr's level of culpability, was permitted to plead guilty to the New Jersey indictment and was sentenced to an 18-month jail term by a different judge, premised upon different criteria.

Landwehr's sentence, based upon his own participation in the crime, was more than just and reflects his key role in this massive interstate fraud.*

* The District Court properly considered Landwehr's overall culpability even though he pleaded guilty to the filing of an operative statement which was false only in its overstatement of profit. 18 U.S.C. §3577. Cf. *United States v. Sweig*, 454 F.2d 1000 (9th Cir. 1972), and cases cited therein.

POINT II**The Government Did Not Breach Its Plea Agreement With the Defendant.**

Landwehr also argues that he did not receive the benefit of his plea bargain with the Government. This claim is groundless.

The Government agreed to advise the Court "of the full nature, extent and value of the cooperation" furnished by Landwehr. The Government's representation in that regard was "conditioned upon" certain actions by Landwehr, including his cooperation by "providing complete, candid and truthful information." Thus, by the express terms of the agreement which Landwehr signed, the Government was not obligated to report favorably about Landwehr's cooperation unless he had in fact cooperated. Thus, his breach of the agreement by failing to provide truthful information then triggered no obligation on the Government's part, and certainly no obligation to report that Landwehr had been cooperative when the Government believed that he had not been.

Santobello v. New York, 404 U.S. 257 (1971), upon which the defendant relies, does not alter the result here. *Santobello* simply holds that the prosecution must comply with its agreement. There, when the district attorney had agreed to recommend a fifteen-year sentence but through inadvertence recommended an eighteen-year term, the Court remanded for specific performance. Here the Government did live up to its agreement by advising the Court of the nature, extent and value of Landwehr's cooperation. The defendant bargained for no more and he received what he bargained for.

Nor could the Government be required here to argue with vigor that Landwehr had cooperated. This was not

a case, like *United States v. Brown*, 500 F.2d 375 (4th Cir. 1974), where the prosecutor made a half-hearted recommendation on sentence. Compare *Bergman v. Lefkowitz*, Dkt. No. 77-2123, slip op. 747 (2d Cir. December 19, 1977). The Government's obligation here was simply to call certain matters to the Court's attention, which it did. Although he admittedly lied and did not cooperate fully, Landwehr somehow expected the Government to follow his lead and advise the Court with vigor that he had cooperated. This Court would hardly expect the Government to act in that fashion.

Landwehr cannot claim all the benefits of a plea agreement where he himself is in default. *United States v. Nathan*, 476 F.2d 456, 459 (2d Cir.), cert. denied, 414 U.S. 823 (1973). Nonetheless, he did receive much of the benefit of his bargain here: dismissal of thirty-two counts of the New York indictment and the entire fifteen-count New Jersey indictment. Landwehr's own failure to comply with the agreement cannot be used to force the Government to mislead the sentencing court on the issue of cooperation. Surely a plea agreement cannot be read to require the Government to make representations to the Court which the Government does not believe to be true. See generally *United States v. Michaelson*, 522 F.2d 472, 475 (2d Cir. 1977); *United States v. Needles*, *supra*, 472 F.2d at 654-55.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

T. BARRY KINGHAM,
RICHARD WEINBERG,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

T. Barry Kingham being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 9th day of MARCH, 1978,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

Steven H. Gifis, Esq
68 Bayberry Rd.
Princeton, New Jersey 08540

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

T. Barry Kingham

Sworn to before me this

9th day of MARCH, 1978
Jeanette Ann Gray

JEANETTE ANN GRAY
Notary Public, State of New York
No. 24-1241575
Qualified in Kings County
Commission Expires March 30, 1979

